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77-406

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Pacific Telephone and Telegraph Company, a party in the proceedings below, pursuant to Supreme Court R. 21(4), submits this brief as Respondent in support of Petitioners' request that a writ of certiorari issue in this proceeding.

QUESTIONS PRESENTED

The case at bar results from a declaratory ruling by the FCC, which, contrary to an order of the California Public Utilities Commission, authorizes Southern Pacific Communications Company (SPCC), to provide foreign exchange service between two points in California based on the fact the same facilities are also used for interstate calls (App. B).[1] The questions presented are:

1. Does the FCC's preemptive assertion of jurisdiction over intrastate foreign exchange service violate the explicit mandate of Section 2(b) of the Communications Act that "nothing in this Act" shall "apply to or give the Commission jurisdiction with respect to charges (or) facilities . . . for or in connection with intrastate communication service by wire or radio of any carrier." (47 U.S.C. §152(b), (App. D).

2. Assuming the first question is answered in the negative, then does the record demonstrate the unavoidable necessity for the exercise of that power in this case?

STATEMENT OF THE CASE

From almost the beginning of telephony the individual states have pervasively regulated the provision of public telephone service in this country. However, prior to the passage of the Communications Act in 1934, interstate rates for long distance service were not extensively regulated. Through the vehicle of the Communications Act, Congress sought to fill this void by provision of adequate federal regulation over interstate service but, at the same time, to preserve existing state regulation over intrastate services and protect it against federal invasion.

[1]The appendices (App.) are separately bound and are being jointly submitted by The People of the State of California, The Public Utilities Commission of the State of California (CPUC) and the National Association of Regulatory Utility Commissioners (NARUC).

Since enactment of the Communications Act, state and federal regulatory spheres, with respect to the regulation of intrastate and interstate telephone service, have been traditionally determined by the beginning and ending points of the telephone call. Normally, the FCC has regulated communications crossing state lines and the states have regulated all communications taking place within a single state, even though the same equipment and facilities may be used for both.[2] This division of jurisdiction conforms to the legislative mandate. Sections 2(b) and 221(b) of the Act evidence a deliberate Congressional intent to preserve existing state regulation. By enactment of these sections Congress reserved to the States "exclusive" jurisdiction over intrastate service (S. Rep. No. 781, 73d Cong. 2d Sess. 3 (1934)) to assure that the legislation would not affect the 97 or 98 percent of telephone communications that were and are intrastate. 78 Cong. Rec. 10316 (1934).[3] As the Senate Manager explained during Congressional hearings on the Act:

> "[A]t the request of the State Commission representatives, we wrote in certain provisions that are not in the Interstate Commerce Act, to protect the State commissions against being overridden by this Commission [the FCC],

[2]A telephone message originating within a state and terminating within that same state is considered an intrastate transmission, even if it transverses another state in the process. The Communications Act provides that "'Interstate communication' . . . shall not . . . include wire or radio communication between points in the same State, Territory or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission." 47 U.S.C. §153(e); see also 47 U.S.C. §221(b).

[3]Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong. 2d Sess. 179 (1934) (Senator Dill).

as the Interstate Commerce Commission has overridden some of the State railroad Commissions." [Hearings, H.R. 8301 at 136].

In establishing federal regulation, Congress not only restricted the FCC's jurisdiction to prevent federal interference with state regulation, but also enacted public interest standards to be applied by the FCC within its area of competence. Under the Congressional plan the FCC in regulating interstate carriers may not "[m]erely . . . assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one . . ."[4] This case involves only the scope of the FCC's jurisdiction—not the validity of the policies it seeks to implement. The present controversy, nevertheless, stems from new FCC regulatory policies promulgated in the past decade. It first permitted certain businesses to construct their own interstate "private line" telephone facilities and later authorized the entry of numerous new common carriers (called specialized carriers) to provide interstate "private line" service in competition with the telephone companies.[5] SPCC is such a carrier.

In a radical departure from the regulatory pattern which has existed for over 50 years, the FCC, in the case at bar, has overriden a state commission's contrary order and has asserted plenary regulatory authority over the terms and conditions of

[4]*FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 94-97 (1953). *Accord, Hawaiian Telephone Co.* v. *FCC.* 498 F. 2d 771, 776 (D.C. Cir. 1974).

[5]*Specialized Common Carrier Inquiry,* Docket No. 18920. *Notice of Inquiry,* 24 FCC 2d 318 (1970); *First Report and Order,* 29 FCC 2d 870 (1971); reconsideration denied, 31 FCC 2d 1106 (1971); affirmed, *Washington Utilities and Transportation Commission* v. *FCC,* 513 F. 2d 1142 (9th Cir. 1975); cert. denied, 423 U.S. 836.

intrastate foreign exchange service.[6] To accomplish this objective it has jettisoned the regulatory road map laid out in the Communications Act and has ridden rough-shod over conflicting regulatory views held by state commissions. In short, it has determined that it and it alone can adjudicate what is in the best interest of the general body of telephone users in the United States.

The history of this case begins in 1973, when SPCC, a specialized communications carrier, obtained approval from the FCC to operate an interstate microwave private line network between San Francisco, Los Angeles, Phoenix and Tucson. Following installation of its interstate network, SPCC filed an application with the California Public Utilities Commission (CPUC) to provide intrastate private line services. After hearings, the California Commission on March 4, 1975, issued an interim order granting SPCC authority to provide private line service between six California cities. This did not include San Diego. (Decision No. 84167, which appears at Appendix C). The CPUC also ordered rates for the service be set at a point that would minimize rate differentials between SPCC's service and the duplicate services of the telephone companies. It did this to protect the general body of telephone customers

[6]Foreign exchange (FX) service is a distinct class of service that is separate and apart from other types of telephone service. It is a service whereby a telephone subscriber located in one exchange area may obtain exchange telephone service in another area as if his telephone were actually located in that other exchange. Thus, for example, a subscriber in the Los Angeles exchange may utilize FX service to reach telephone subscribers located in the San Diego exchange. This capability is afforded through provision of a local loop in Los Angeles (referred to as the "closed-end" of the FX), a Los Angeles-San Diego interexchange private line (dedicated to the customer's exclusive use), and business exchange service (one or more business lines) in the San Diego exchange area. The enterprise that engages in bringing access to the San Diego exchange from Los Angeles provides an intrastate service, even though interstate calls may also be switched through the same for completion.

from the economic burden of making up the revenues which the telephone companies would lose if wide rate disparities were permitted. For the same reason the CPUC prohibited SPCC from providing:

> "7. Any direct connection of private line circuits to the exchange network is prohibited. *This includes any connection similar to foreign exchange service.*" (Emphasis added) (App. C p. 114).

Several weeks after the CPUC's order was issued, SPCC made a service request of Pacific to provide the facilities and connections needed by it to provide intrastate FX service to San Diego. Specifically, Pacific was asked to connect a SPCC San Diego-Los Angeles line (1) at the southern end to Pacific's San Diego exchange, and (2) at the Los Angeles end to Pacific's Common Control Switching Arrangement (CCSA)[7] to permit interconnection to American Airlines' nation-wide private line system. By this arrangement SPCC would be able to furnish American Airlines San Diego FX exchange service, which could be accessed from any telephone on that company's network, including Los Angeles and other cities in California.[8]

Pacific furnished SPCC the facilities and connections requested. However, recognizing that these arrangements conflicted with the recent CPUC Order prohibiting the offering of intrastate FX service by SPCC, it initiated proceedings before the California Commission for instructional advice.

In response, SPCC, on June 15, 1975, petitioned the FCC for a declaratory ruling to the effect that Bell System companies

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[7]CCSAs are large switching machines, located in telephone company central offices, which are used to switch private line network traffic.

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[8]SPCC, in its pleadings, estimated approximately 18% of the traffic over the San Diego-Los Angeles line originates in California (Ct. of App., Jt. App. p. 334).

must provide FX interconnections to SPCC's private lines whenever such lines are connected by a switch to interstate facilities. Pacific, CPUC and others filed comments and statements with the FCC opposing SPCC's petition. Based solely on these pleadings, the FCC, on October 9, 1975, issued a Memorandum Opinion and Order, granting, in effect, the relief sought by SPCC (App. B).

In its opinion the FCC recognized that the facilities involved were located wholly within California and would be used to provide foreign exchange service in San Diego from points both in and out of the State of California. However, in analyzing its jurisdictional authority, the Commission concluded that the physical location of the facilities was not jurisdictionally determinative. Rather, the Commission reasoned, the nature of the communications passing through the facilities should control federal-state regulatory jurisdiction. Applying this test, the Commission determined it was entitled to assert preemptive jurisdiction because the facilities constituted an integral part of a dedicated interstate communications network carrying interstate communications (App. B).

Although it had no evidentiary record before it, the Commission further concluded it would be contrary to the public interest to limit SPCC's San Diego-Los Angeles private line to interstate calls. Accordingly, the FCC exercised preemptive jurisdiction and ordered the Bell System (Pacific) to continue to provide the facilities in question to SPCC.

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's Order by a two-to-one vote (App. A). The majority's opinion accepted the FCC's conclusions that it would be impractical to segregate interstate from intrastate FX service, and, consequently, because the "facilities are part of a dedicated interstate communications network" Commission jurisdiction was present. The majority further adopted without

discussion the Fourth Circuit's interpretation of Section 2(b) of the Communications Act to the effect that such section does not encroach substantially upon the FCC's broad powers under Title II. *North Carolina Util. Com'n* v. *FCC*, 537 F. 2d 787, 793, affirming *Telerent Leasing Corp.*, 45 F.C.C. 2d 204, cert. denied U.S. , 59 L. Ed. 2d 63 (1976). Judge Robinson, in a well reasoned dissent, agreed that the FCC is empowered to regulate intrastate communications, but only when an unavoidable federal and state regulatory conflict occurs. However, based on careful analysis of the record, Judge Robinson concluded that the evidence before the Commission did not substantiate a clearly imperative need for the Commission to assert federal preemption.

REASONS FOR GRANTING THE WRIT

The jurisdictional issue posed—whether the FCC's assertion of preemptive jurisdiction is prohibited by the Communications Act—is extremely important and merits plenary consideration on certiorari. This issue in the case at bar is broader than the conventional preemptive issue—whether a particular federal statute conflicts with and preempts a particular state statute.

The case *sub judice* arguably holds that the FCC can broadly regulate intrastate telephone services, except possibly local exchange rates, whenever federal and state jurisdictions overlap to any degree. The decision, unless reversed by this Court, could alter drastically a great number of the regulatory laws of every state, not merely one particular statute in one state.

The FCC's assertion of jurisdiction in this case and, potentially, in many others, will impact telephone company intrastate revenue to such an extent that local exchange rates, clearly within the jurisdiction of the state commissions, will be substantially affected. This Court has not yet quantified the

regulatory balance of the federal-state Title II authority established by the Communications Act of 1934. Consequently, the case presents an "important question of federal law which has not been, but which should be settled by this Court" [S.Ct. R. 19(1)(b)].[9]

Moreover, even if it is assumed that the Communications Act does vest preemptive jurisdictional authority in the FCC when an irreconcilable conflict occurs between federal and state regulation, the record in this case does not support the Commission's exercise of such drastic authority. The FCC's conclusion that it was obligated to assert preemptive jurisdiction rests on a factual assumption unsupported by the evidence. The FCC, although requested, did not see fit to hold hearings and, consequently, no opportunity was afforded the parties to develop and present the evidentiary issues. Instead, as Judge Robinson pointed out in his dissent in the Court of Appeals, "The Commission proffered only an ambiguous finding unaccompanied by any evidentiary data whatsoever" (App. A, p. 15). The FCC's choice of procedure in this case has patently deprived the parties of their due process rights and represents such a departure from "the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." [S.Ct. R. 19(1)(b)].

[9]This Court has repeatedly recognized its responsibility to delineate the jurisdictional boundaries fixed by federal regulatory statutes (Communications Act) *United States* v. *Southwestern Cable Co.*, 302 U. S. 157 (1968); *Regents of Georgia* v. *Carroll*, 338 U. S. 586 (1950); (Federal Power Act) *FPC* v. *Conway Corp.*, 426 U. S. 271 (1976); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395 (1975); (Natural Gas Act) *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954); *FPC* v. *Transcontinental Pipe Line Corp.*, 365 U. S. 1 (1961); *California* v. *FPC*, 369 U. S. 482 (1962); (Interstate Commerce Act) *North Carolina* v. *United States*, 325 U. S. 507 (1945); *Florida* v. *United States*, 282 U. S. 194 (1931).

The FCC's cavalier treatment of the preemption issue conflicts with decisions of this Court, as stated in *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963):

> "... federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons ... either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordered."

The past 30 years of joint federal-state regulation of telephony clearly demonstrates that the nature of the subject matter does not necessitate federal preemption. Nor has Congress "unmistakably . . . ordered" federal preemption of intrastate telephone communications. In fact, Section 2(b) of the Communications Act reflects the exact opposite intent. Thus, in order to avoid further erosion of established standards for federal preemption, certiorari should be granted.

1. Certiorari Should Be Granted Because of the Nature and Importance of the Jurisdictional Issue.

The FCC's usurption of California's authority in this case presents a delicate issue of federal-state relations. The Court has repeatedly granted certiorari when federal power is invoked to override powers historically exercised by the states.[10]

The imperative for Supreme Court review in cases of asserted federal preemption applies with special force to the instant case. Practically all telephone facilities in the United States are interconnected and used interchangeably for both interstate and intrastate messages. If the holding of the Court below is permitted to stand, the specter of intervention will hang constantly over the regulatory processes of each individual state. Continuing the trend illustrated by the *Telerent* decision,

[10]*E.g., FPC* v. *Conway Corp.*, 426 U.S. 271 (1976); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395 (1975); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *FTC* v. *Bunte Bros.*, 312 U.S. 349 (1941); *Rice* v. *Board of Trade*, 331 U.S. 247 (1947).

supra, the FCC will undoubtedly assert the power to abrogate state authority over intrastate telephone rates, services and facilities whenever, in its sole opinion, such preemption would best serve the national public interest.

The telephone companies will likewise be placed in an untenable position. To illustrate the quandry, the Court need only consider the result of this case. The California Commission's policy is to maintain local exchange rates for the general body of customers at the lowest possible level through subsidization from services such as FX. On the other hand, the FCC's policy is to promote competition by pricing interstate private line and other special services on a cost basis. Because of these divergent policies, California intrastate private line rates are priced several times higher per circuit mile than interstate rates. Companies such as American Airlines, which maintain interstate networks with linking intrastate lines will, as a result of this case, switch to specialized common carriers, such as SPCC, as a matter of business economics.

The record reflects that telephone companies in California will suffer a fifteen million dollar annual revenue loss by reason of the FCC's order in this case. (Ct. of App. Jt. App. Vol. 2 p. 247). This revenue deficiency can only be made up by general rate increases on exchange and other intrastate services. The savings which will accrue to large users will ultimately come out of the pocket of the average residence telephone user. Consequently, the inequities of this case present a public interest issue of national magnitude.[11] The general body of telephone users (i.e., the American public) is entitled to a determination by this Court as to whether the FCC or the individual states should control intrastate rate policies.

[11]This Court has traditionally granted certiorari in cases involving principles which are of importance to the general public, as distinguished from the parties alone. *Rice* v. *Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955).

2. The Decision Below Misconstrues the Communications Act's Reservation of State Jurisdiction and Disregards Long-Standing Rules of Statutory Construction Established By This Court.

Certiorari is further justified because of basic legal errors in the majority opinion. The decision below, sustaining the FCC's claim of jurisdiction, is literally irreconcilable with the plain language of the Communications Act. Further, it disregards the Act's legislative history and decisions of this Court which hold that long-standing state regulation is not to be preempted without the clearest evidence that Congress intended such displacement.

Initially, the language of the statute must be examined to ascertain its meaning. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The language of Section 2(b) of the Communications Act is quite clear. It reads in pertinent part:

> "Subject to the provisions of section 301 [regarding the licensing of radio frequency uses], *nothing in this Act shall be construed* to apply or to *give the Commission jurisdiction* with respect to . . . charges, classifications, practices, *services, facilities,* or regulations *for or in connection with intrastate communication service* . . ." *(EMPHASIS ADDED.)*

The emphasized language absolutely precludes the FCC from regulating intrastate FX service or the facilities used to provide such service. The section contains no caveat authorizing federal preemption in the event of a federal-state policy conflict nor does the fact that facilities may also be used to carry interstate messages vest the FCC with more than concurrent jurisdiction.

The FCC, to justify its action preempting state jurisdiction, relies heavily upon Title I, Section 1 of the Act, 47 U.S.C. 151. That section is a statement of general objectives to be achieved by the FCC through regulation of interstate commerce, as provided by Titles II and III.[12] However, the Commission

[12]Section 1 states, *inter alia*, that the purpose of the Act is to provide nationwide wire "communication service with adequate facilities at reasonable charges."

cannot impose the general goals of Section 1 in an unlimited fashion upon intrastate commerce in view of the fact that its jurisdiction is explicitly limited by Section 2. Otherwise, Section 2 becomes meaningless. It is an elementary rule of statutory construction that specific terms prevail over general terms which might otherwise control. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957). Nevertheless, the FCC, in this case, has ignored this rule and has almost totally denuded the more specific Section 2(b) of its plain meaning by construing it to refer only to those services and facilities used exclusively for intrastate communications. This interpretation of the statute is irrevocably in conflict with the express statutory language that "*nothing* in the Act" shall be construed to give the Commission jurisdiction with respect to "services or facilities *for or in connection with* intrastate communication." The words *in connection with* can only refer to facilities communally used for interstate and intrastate messages. Therefore the power balance in event of controversy rests in the states, not the FCC.

Moreover, if a statute is reasonably susceptible to more than one meaning, the court must consult, not only the language, but also felt and openly articulated concerns which motivated the framers of that law. *National Petroleum Refiners Ass'n* v. *FTC*, 482 F. 2d 672, 690 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1974). The legislative history of the Communications Act supports a reservation of jurisdiction in the states for all services and facilities in connection with intrastate commerce. At the time federal interstate regulation was considered, the states rightfully anticipated that the FCC would eventually reach for preemptive power. Congress responded to those concerns by adding, in Section 2(b) and 221(b),[13] language which it contemplated would absolutely preclude FCC preemption of intrastate regulation.

[13]Section 221(b) vests regulation authority in the states with respect to telephone exchanges bridging state lines.

The Communications Act of 1934 had its roots in bills introduced by Senator Couzens, Chairman of the Senate Committee on Interstate Commerce in 1928 and 1929.[14] These bills, as originally drafted, incorporated the so-called *Shreveport* Doctrine and would have allowed the federal commission to regulate intrastate commerce when necessary to protect interstate commerce. Thirty-seven states and their national association, predecessor of the NARUC, adopted resolutions opposing the original bills and vehemently opposed any legislation that might empower the FCC to supersede existing state jurisdiction in the communications field.[15] In response to the states' protest the bills were revised to incorporate provisions designed to protect the state commissions from being overriden by the FCC and the states thereupon withdrew their opposition.[16]

The chronology of the legislative resolution of the regulatory balance of power issue is well summarized in the testimony of John E. Benton, General Solicitor of the NARUC, given at the hearings:

> "Unless the Congress wishes to bring control of local telephone business, which is now subject to State regulation under the domination of the new commission, it cannot merely transfer the existing power of the Interstate Commerce Commission to this new commission. It must describe the field within which the new commission shall operate.

[14]S. 2041, 70th Cong., 1st Sess. introduced Jan. 4, 1928, 69 Cong. Rec. 928, S. 6, 71st Cong., 1st Sess. introduced April 18, 1929, 71 Cong. Rec. 102.

[15]Hearings on S. 6 before the Senate Committee on Interstate Commerce, 71st Cong., 1st Sess. 2167-68 (1930).

[16]Hearings on H.R. 8301 before the House Committee on Interstate and Foreign Commerce, 73 Cong. 2d Sess. 136 (1934); S.Rep.No. 781, 73d Cong. 2d Sess. 3 (1934).

> "The Couzens communications commission bill, in the Seventy-First Congress, as that bill was first introduced, did not do that. It proposed to transfer the present powers of the Interstate Commerce Commission to the new commission unchanged. The State commissions were greatly alarmed. The national association in convention by unanimous action adopted a resolution protesting against the passage of the bill and 37 State commissions by resolution or otherwise took separate action in opposition. They were heard at great length against the bill before the Senate Committee; and I think we are justified in believing that we satisfied the committee that no Federal commission ought to be given powers which would enable it to interfere with State regulation."
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> * * *
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> "This bill has been drawn with care to safeguard State power to regulate local telephone service. It has been carefully considered by our executive and legislative committee representatives and has met their approval. They believe that it provides for effective Federal regulation where Federal regulation is necessary, and that it safeguards State regulation." Hearings H.R. 8301 at 136.

The legislative history of the Congress' intent could not be more clear. Yet the FCC, in an effort to broaden the markets of the specialized common carriers, has deliberately asserted preemptive jurisdiction over intrastate foreign exchange rates in this case and the District of Columbia Court of Appeals, relying on *Telerent*, has perfunctorily endorsed FCC jurisdiction.

Moreover, the appellate court, by ignoring the obvious purport of Section 2(b), its legislative history and prior regulatory history, has contradicted this Court's repeated directive that state and local regulatory control should not be superseded without the clearest expression of Congressional intent. "As a matter of statutory construction Congressional intention to

displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated. . . ." *Mauer* v. *Hamilton*, 309 U.S. 598, 614 (1940). This rule mirrors Congress' own policy of preserving state authority over "matters heretofore left to local custom or local law." *FTC* v. *Bunte Bros., Inc., supra*, 312 U.S. at p. 354.

Unvarnished, the facts disclose here an improper assertion of power on the part of the FCC which should not be condoned by this Court. Certainly, there exists no "clear and manifest purpose" of Congress to oust state control over intrastate foreign exchange service merely because the same facilities may be employed for interstate service. On the contrary, the language of the Act, its structuring of Title II authority, and its legislative history all reflect that Congress intended state regulatory power to "remain unimpaired." *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 152 (1963).

3. Federal Preemption Was Not Warranted Under the Circumstances of This Case.

Certiorari is warranted for yet another reason. Even if Section 1 confers federal preemptive authority, the law requires, as pointed out by the dissent in the Appeals Court, that it be exercised only when circumstances make it unavoidable. The record in this case is totally devoid of evidence supporting such an imperative.

The FCC in its order intitiated its anaylsis of the jurisdictional issue by noting that interstate communications would be transmitted over the physical intrastate FX facilities. For this reason the FCC labeled the facilities interstate and then employed that characterization to preempt entirely all state jurisdiction over FX services provided over the facilities.

In the pleadings to the FCC, it was suggested that a federal-state regulatory conflict could be avoided by limiting transmissions over SPCC's line to interstate calls, leaving intrastate transmissions to a separate FX line which would be

subject to state regulation. Responding to this possible solution, the FCC opined that such an arrangement would not be in the national public interest and would, therefore, conflict with its mandate under Section 1 because it would require the customer to maintain redundant facilities. The Commission did not and could not cite evidence to support its conclusion as none was contained in the record. This finding, the only averment to the necessity for preemption (if it can be labeled such) in the Commission's opinion, is, as Judge Robinson put it "a far cry from what is required."

Absent federal legislation regulating commerce not admitting of diversity of treatment and therefore requiring uniformity of regulation, the states retain a wide range for permissible exercise of regulatory power, even though interstate commerce may be affected. The *Minnesota Rate Cases*, 230 U.S. 352, 398-402 (1913). Furthermore, state commissions retain jurisdictional authority over intrastate services even though common carriers may use the same facilities for providing interstate service. *Texas & CRR* v. *Northside Ry.*, 276 U.S. 475, 480 (1928). As stated in the *Minnesota Rate Cases*, at page 432, the "inter-blending of operations in the conduct of interstate and local business by interstate carriers" does not serve to oust state commissions of their authority to regulate in the public interest. Consequently, if the Communications Act does not preclude the FCC from asserting preemptive jurisdiction over intrastate communications services, then its justification for the exercise of that power must be imperative and clearly apparent from the record.[17]

The FCC has not provided evidentiary findings showing continued state regulation of intrastate FX service would be incompatible with, constitute, a burden on, or irreconcilably conflict with its regulation of interstate private line services. Its conclusion that a jurisdictional "split" of FX service would be

[17]See cases cited in Footnote 10 and in Judge Robinson's dissent.

"technically and practically difficult" is unsupported. And even if correct, would not substantiate the abrogation of state regulation. *National Association of Reg. Util. Comrs.* v. *FCC*, 533 F. 2d 601 (D.C. Cir. 1976).

The FCC was not empowered to preempt state regulation of intrastate FX service without first establishing, after an evidentiary hearing and full consideration of all relevant factors, that such action was unavoidably necessary to protect the availability of interstate private line communications. Cf. *North Carolina* v. *United States*, 325 U.S. 507 (1945); *Panhandle Eastern Pipeline Co.* v. *Michigan Public Service Com'n.*, 341 U.S. 329 (1950). Its failure to do so has clearly violated the parties' right to due process and has fatally marred the validity of its order. *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

CONCLUSION

For the reasons stated, certiorari should be granted and the case set for plenary review by this Court.

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